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Rescission of Adjustment of Status and Removal Proceedings

Pursuant to INA § 246(a), lawful permanent resident status may be rescinded within five years of adjustment if it appears that the alien was ineligible at the time his/her status was adjusted. See Matter of Masri, 22 I&N Dec. 1145, 1149 (BIA 1999) (holding that the Attorney General's authority under INA § 246 extends to rescission proceedings involving an alien who has been granted adjustment of status pursuant to INA § 210). As INA § 246(a) relates only to proceedings to rescind lawful permanent resident status acquired through adjustment of status, the 5-year statute of limitations in that section is not applicable to bar the removal of an alien who was admitted to the United States with an immigrant visa. Adams v. Holder, 692 F.3d 91, (2d Cir. 2012); Matter of Cruz De Ortiz, 25 I&N Dec. 601 (BIA 2011) (distinguishing Garcia v. Attorney General of the United States, 553 F.3d 724 (3d Cir. 2009)). The Board of Immigration Appeals has held that the Department is not required to complete rescission proceedings within five years, as the statutory period will be tolled by the issuance of a Notice of Intent to Rescind. See Matter of Pereira, 19 I&N Dec. 169, 171 (BIA 1984); Matter of Onal, 18 I&N Dec. 147, 149-50 (BIA 1981, 1983). The failure of the Department to rescind permanent resident status within the five-year statutory period does not preclude removal proceedings from being instituted if grounds of removal exist. See Matter of Belenzo, 17 I&N Dec. 374 (BIA 1980, 1981; A.G. 1981) (holding that the five-year rescission limitation does not bar subsequent deportation proceedings even where the alleged grounds for deportation were acts committed in the procurement of adjustment of status); see also Matter of S-, 9 I&N Dec. 548 (BIA 1961, 1962; A.G. 1962) (finding that the five-year rescission limitation does not preclude subsequent deportation proceedings against adjusted aliens who, before adjustment was made, committed acts justifying deportation).

Jurisdiction over rescission proceedings vests with the Immigration Judge if rescission is not complete before removal proceedings commence. See Masri, 22 I&N Dec. 1145. An order of removal from an immigration judge is sufficient to rescind resident status. INA § 246(a). As such, the Department is not required to rescind an alien's status before the commencement of removal proceedings. INA § 246(a).

The Department bears the burden of proving by clear, unequivocal, and convincing evidence that the alien was ineligible for adjustment of status to rescind an alien's lawful permanent resident status. See Matter of Hernandez-Puente, 20 I&N Dec. 335, 337 (BIA 1991); Pereira, 19 I&N Dec. at 171. If the Department alleges that an alien has abandoned lawful permanent resident status due to an absence from the United States of more than one year, and the applicant presents a colorable claim to returning resident status, the Department bears the burden of proving abandonment by "clear, unequivocal and convincing evidence." Matadin v. Mukasey, 546 F.3d 85, 91 (2d Cir. 2008) (citing Hana v. Gonzales, 400 F.3d 472, 476 (6th Cir. 2005); Khodagholian v. Ashcroft, 335 F.3d 1003, 1006 (9th Cir. 2003)). The decision of the Immigration Judge shall order either that the proceeding be terminated or that the adjustment of status be rescinded. See 8 C.F.R. § 1246.6.